In the Supreme Court of the United States

OCTOBER TERM, 1900. No. 193.

THE INTERNATIONAL NAVIGATION COMPANY,
Appellant (*Respondent*),

vs.

THE FARR & BAILEY MANUFACTURING CO.,
Appellee (*Libellant*).

BRIEF FOR THE INTERNATIONAL NAVIGATION COMPANY, Petitioner and Appellant.

STATEMENT OF THE CASE.

This case comes before this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit. The action is a suit *in personam* in admiralty, originally brought in the United States District Court for the Eastern District of Pennsylvania by the Farr & Bailey Manufacturing Company against the International Navigation Company. The libel was filed on August 16th, 1895. The case was tried in that Court before the Honorable WILLIAM BUTLER, late Judge of the United States District Court for the Eastern District of Pennsylvania, who resigned the office of Judge before a decision was rendered; and afterwards the case was again tried or argued before the Honorable JOHN B.

McPherson, Judge of the said Court, and on April 28, 1899, an opinion was delivered sustaining the Libel and referring the cause to a Commissioner to determine the extent of the loss. (See opinion, Record p. 95.) Thereafter on May 5, 1899, the appellant having moved for a reargument of the cause, and the reargument having been granted, Judge McPherson again heard the case upon the questions raised by the motion for a reargument, and on June 22, 1899, filed an opinion reversing his former decision and dismissing the libel (see opinion, Record p. 99), and a decree was subsequently entered dismissing the Libel, with costs. (Record p. 102.) From this decree the Farr & Bailey Co. appealed to the United States Circuit Court of Appeals for the Third Circuit. The case was heard in that Court before the Honorable Judges Acheson, Dallas and Gray. By the decision of the Court of Appeals, filed November 28, 1899 (see opinions, Record p. 104, 107), a majority of the Court, to wit, Judges Acheson and Dallas, filed an opinion per Dallas, J., reversing the decree of the District Court and holding the appellant liable for the damage claimed; while Gray, J., filed a dissenting opinion to the effect that the decree in the Court below should be affirmed. Thereafter a petition for a writ of *certiorari* was filed in this Court by the respondent and appellant, which was granted.

STATEMENT OF FACTS.

The suit is one in admiralty for damages to cargo, to wit, certain bales of burlaps, laden on board the steamship *Indiana* by reason of sea water entering through a port hole of the steamship in the compartment in which the goods were stowed.

The appellant, the International Navigation Company, a corporation organized under the laws of the State

of New Jersey, is and was the owner of the steamship *Indiana*. In pursuance of a Bill of Lading, dated May 21, 1895, printed in full in the Record, p. 11, it was agreed by appellant to transport from Liverpool to Philadelphia upon said steamship and deliver unto the appellee, the Farr & Bailey Manufacturing Company, certain bales of burlaps therein mentioned. The Bill of Lading provided that the carrier should not be liable for loss occasioned by accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship owner, not resulting however in any case from want of due diligence by the owners of the ship or by unseaworthiness of the ship at the commencement or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness; and the contract was in terms made subject to the law of England. The contract was further subject to the Act of Congress of February 13, 1893, commonly known as the "Harter Act."

The steamship *Indiana* left the port of Liverpool on May 22, 1895, fully manned, equipped and supplied; she was a staunch boat, without defects of structure or equipment, with a well chosen and competent crew of officers and men, and in all respects was generally seaworthy.

The bales of burlaps were received on board in good condition, and were stowed with other goods in compartment No. 3 of the lower steerage, or between-decks of the vessel (the deck just below the main or passenger deck) which was frequently used from time to time for the conveyance of passengers, when glass port covers only would be closed; there was but one tier of cargo two or three feet high covering the floor and access to the port holes, of which there were two on either side of the compartment, was easy and unobstructed. The

ports were of the usual character and dimensions, fitted, first with a glass window set in brass, over which could be screwed down an iron plate or covering, called a "dummy," both window and dummy being fastened by nuts and screws. All parts of the port covers were in perfect condition. Access to the between-decks compartment No. 3 was by a hatchway which was closed and battened down, but the hatch cover being in sections was capable of being opened in a few moments so as to permit a man to descend and pass to the port holes without delay or difficulty.

The ship's carpenter, the second and third officers, and two foremen stevedores, had inspected and examined the ports prior to sailing in accordance with the rules and regulations of the company, and had found them in proper order, and securely closed with the covers screwed down. The last of these witnesses left the compartment at 1.45 a. m. of the day upon which the vessel left her dock at 8 a. m. (Record p. 31, 36, 40, 49.) After the voyage began, during the first four or five days out, there were fresh breezes with the vessel rolling heavily at times, with occasional heavy swells and choppy head seas (Record p. 60) sufficient to submerge the port hole, but no water came in, as shown by the daily soundings taken. At the end of that period water was discovered through the soundings to be in the hold, and at 9 a. m. Tuesday, May 26th, the captain ordered the carpenter to go down into compartment No. 3, which he did, having no difficulty in throwing aside a section of the hatch, descending and crossing over the cargo to the port hole, which he found open, with water entering and wetting the cargo. He instantly closed and screwed fast the port and covers, without difficulty or delay. There was no imperfection or breakage of the port or of its equipment.

In the compartment the cargo did not reach within a foot or so of the lower rim of the port hole, and in no respect impeded the opening or shutting of the same. On the outside, taking the draft of the vessel fore and aft the lower rim of the port hole accurately measured was at a distance of four feet and a half an inch above the water level. (Record p. 58.) In the Courts below, it was claimed by the appellant that the port holes of compartment No. 3 having been admittedly inspected upon the day of sailing in accordance with the rules and regulations of the company, only three or four hours before the hatches were battened, and having been found properly closed and fastened both as to the glass cover and the iron cover, the port hole in question must have been opened by some one on board the ship after sailing or must have become forced open in some unknown manner after sailing, although originally properly fastened. Judge DALLAS finds in the Court below that although probably not open so that water could be admitted at the time of sailing, the port hole in question was insufficiently fastened, and afterwards was worked open by the action of the sea. There is no direct evidence as to how or why the port hole became open.

Upon the arrival of the steamship *Indiana*, and the discovery of the damage to the cargo, the libel *in personam* was filed, claiming damages in the sum of $2,084.15.

In the Courts below the questions raised and now brought for review before this Court are:

1. Was the *Indiana* seaworthy?

2. Was the damage to the cargo due to a fault or error in management of the vessel within the exemption of the Harter Act?

3. Is the case ruled by that of the *Silvia*, 171 U. S., 462?

ASSIGNMENTS OF ERROR.

The learned Court below erred:

1. In reversing the decree of the District Court.

2. In directing that a decree be entered adjudging the respondent to be liable for the damages complained of.

3. In sustaining the assignments of error filed by the libellant, appellant in the Court below.

4. In not finding that the steamship *Indiana* was in a seaworthy condition when she left Liverpool.

5. In finding that the damage to the cargo was caused not by an error in the management of the vessel, under the Act of Congress known as the Harter Act, but by unseaworthiness.

6. In not finding that the damage was caused by a fault or error in management.

7. In not finding that the case was ruled by that of the *Silvia*, 171 U. S., 462.

8. In not directing a decree to be entered in favor of respondent, appellant, dismissing the libel.

ARGUMENT.

The essential facts are not disputed and are thus found by the Courts below.

In the District Court the learned Judge finds:

> "In May, 1895, twenty bales of burlaps in good condition were received by the vessel in Liverpool consigned to the libellant in Philadelphia, and a bill of lading was given therefor. The bales were stowed, with some other goods, in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool, water was discovered in the compartment; and when the hatches were opened, a

day or two later, it was found that the after port on the starboard side was admitting water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The libellant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability." (First opinion, Record p. 95.)

"We have little difficulty in coming to the conclusion, that the vessel was a staunch boat, properly manned, equipped and supplied, and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains—the condition of the after port on the starboard side in compartment No. 3." (Record p. 97.)

In the Circuit Court of Appeals Judge DALLAS finds:

"These goods were stowed in a compartment on the lower steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened, but after the *Indiana* had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired."

(Record p. 104.)

As to the condition of the port hole at sailing:

"The impression made upon us by the evidence is, that it was probably closed, but be this as it may, certain it is that it is was not securely fastened, and we are of opinion that by reason of this fact the vessel was unseaworthy."
(Record p. 105.)

Certain minor details of fact will be noticed hereafter.

The question, therefore, raised by the *certiorari* is:

Was the *Indiana* unseaworthy at the time of beginning her voyage from Liverpool to Philadelphia, or was the failure to securely fasten the port covers and keep them fastened a fault or error in the management of the vessel under the exemption of the "Harter Act"? (Feb. 13, 1893, Statutes at Large 27, 445.) See Appendix hereto.

Judges DALLAS and ACHESON, of the Circuit Court of Appeals, held that the vessel was unseaworthy and the owners liable for the damage, Judge GRAY dissenting. The District Court (per MCPHERSON, J.) held (second opinion, Record p. 101) that the case was ruled by that of the *Silvia*, 171 U. S., 462, and that the condition of the port hole when the *Indiana* left Liverpool did not render the vessel unseaworthy, although himself inclined to a contrary opinion. Judge GRAY, in dissenting from the opinion of the majority of the Court of Appeals, not only concurred with Judge MCPHERSON in thinking that the reasoning in the case of the *Silvia* was "on every point applicable to the present case and to be of binding authority on this Court as it was considered to be by the learned judge of the Court below" (the facts being precisely alike, "the only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened"), but also quite apart from the case of

the *Silvia* he considered that the owners were within the exemption of the third section of the Act of Congress known as the "Harter Act."

It is therefore proper to discuss, first, the bearing of the case of the *Silvia* above cited upon the present case; and, second, the broader question of the effect of the Harter Act, in cases like the present.

I.

The bearing of the case of the "Silvia," 171 U. S., 462 (1898), upon the present case.

1. The Case of the "Silvia."

In the case of the *Silvia* cargo was injured by sea water which came through a port in one of the compartments of the between-decks which at the time was used for the storage of ropes and extra gearing. The entrance to the compartment was by a hatch which had been battened down, but which could be opened in two minutes. The port was furnished with a glass cover and with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden. At the time of sailing only the glass cover was closed. Six or eight hours after getting out to sea rough weather was encountered, and water was discovered to be entering the engine room; an investigation showed that the glass cover was broken, and the water had entered the compartment in consequence. Whether the cover was broken by the force of the seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture.

It was held by this Court that the ship was not unseaworthy by reason of beginning the voyage with the iron shutter left open, and the neglect to close it was a fault or error in navigation or in the management of the vessel within the meaning of section 3 of the Harter Act

Mr. Justice GRAY saying:

"But the contention that the *Silvia* was unseaworthy when she sailed from Mantanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no gronnd for holding that the ship was unseaworthy at the time of sailing. *Steele* v. *State Line Steamship Co.*, 3 App. Cas., 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.* (1892), 1 Q. B., 58, 65, and (1894) App. Cas., 222, 227, 228; *Gilroy* v. *Price* (1893), App. Cas., 56, 64." * * * *

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is

equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation, or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P., 563: *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10."

2. Similarity of the two cases.

This is clearly apparent from an analysis of the facts of the two cases. In both cases access to the ports was easy and unobstructed by cargo, thus fulfilling the test of physical accessibility laid down in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72, which has been followed in so many cases, both in England and in this country, and finally approved by this Court in the case of the *Silvia*. In both, the owners had used due diligence in making the vessel generally seaworthy; in both the appurtenances of the port were of the same general size and character and structurally fit; in both the port in question was situated in the between decks, or deck below the steerage in a compartment often occupied by passengers, but on the voyage in question not so occupied; in both cases access to the compartment was by a hatchway covered and battened down, but capable of being opened in an equal period of time. In the case of the *Silvia*, the port was about eight feet above the water line, in our case four feet and half an inch. In the case of the *Silvia*, the damage occurred six or eight hours after the vessel had left her dock, in our case not until four or five days had elapsed. The only difference between the two cases

is, that in the case of the *Silvia* the iron cover was not closed, while in our case the Court below has found that both glass and iron covers while probably closed were insecurely fastened.

If the *Silvia* is to be deemed seaworthy, why not the *Indiana?* The failure to close the glass cover as well as the iron cover, may increase the degree of negligence, but does not alter the essential character of the act. As to the decisive point established as the main criterion by the authorities, viz., *physical accessibility*, the cases are *identical;* the port hole could be reached and closed in precisely the same time in each case. Upon what fact, or facts, then, is the Court asked to distinguish the case of the *Indiana* from that of the *Silvia?*

3. Views of the Lower Courts.

Judges McPherson and Gray hold that the cases cannot be fairly distinguished.

Says McPherson, J. (second opinion, Record p. 101):

> "Some of the cases cited by the respondent can be distinguished without difficulty, and some are not of binding authority; but I am unable to avoid the effect of the decision in the *Silvia*, 171 U. S., 462. I am afraid that I somewhat more than half shut my eyes to the facts of that case. They are strikingly like the facts in the present controversy, so like indeed, that I feel myself bound to accept the conclusions drawn from them by the Supreme Court. I obey the authority of that tribunal, therefore, and now hold that the condition of the port hole when the *Indiana* left Liverpool did not render the vessel unseaworthy."

Judge Gray, in the Court of Appeals, says:

> "The reasoning in the case of the *Silvia*, 171 U. S., 462, however, seems to me on every point applicable to the present case and to be of binding authority on this Court, as it was considered to be by the learned

judge of the Court below. The facts in that case were precisely like those in the present case, the only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened."

Judge DALLAS, however, distinguishes the cases principally upon the ground that in the case of the *Silvia* it was known to the officers and crew that the port hole was insufficiently covered while in the case of the *Indiana* it was not known. He says (Record p. 106), after reciting the facts of the *Silvia:*

"But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not 'usually be left open for the admission of light' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need or occasion for it could have been foreseen or perceived. If, as in the *Silvia* case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed, but the iron cover left open to admit light, it would unquestionably have been the duty of the master upon encountering rough weather to have had the iron cover closed; but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge and for the existence of which he was in no way responsible."

4. The mental state of master and crew as a factor of seaworthiness.

(a) It appears, therefore, that the main, if not only

ground of distinction taken by Judge DALLAS is, that it *was known* in one case that the port hole was insufficiently protected, and it was *not known* in the other case.

Following the present case, a similar view has lately been expressed by Judge BROWN of the Southern District of New York, in the case of the *Manitoba*, 104 Fed., 145, saying:

> "There were, therefore, such easy means for closing the port within a reasonable time when necessary on the voyage, that if the officers had known it was open, I should not have felt at liberty, under the ruling in The *Silvia*, to regard the compartments as being in an unseaworthy condition on sailing, nor should I so hold except for their lack of information as to this fact. In the leading case of Steel *v.* State Line (3 App. Cas., 72) the leaky cargo port was about two feet only above the water line, and was covered up with grain in bulk, making access to it difficult; yet the case was sent back for a new trial, that a jury might find whether this constituted unseaworthiness or not. As respects ease of access to the port, that case was very different from the present."
>
> * * * * *
>
> "In that case (*Silvia*) the officers knew that the shutter was open; here they did not know that fact; and this, as stated below, is in my judgment an essential difference as respects seaworthiness of condition at the start. This, as I understand, was essentially the ground of the decision in Farr *v.* International, 98 Fed., 636."

Is this new criterion of seaworthiness one that commends itself to this Court?

Among the many preceding English cases, and in the case of the *Silvia* itself, there is no hint that the question of knowledge or ignorance of the open or insufficiently protected port was considered important.

Thus in the original case of *Steel* v. *Steamship Co.*, 3 App. Cas., 72, in the House of Lords (1895), no stress was laid upon the question whether those in charge of the vessel knew or did not know of the existence of the opening, and in sending the case back for trial this was not one of the questions referred to the jury. From the manner in which the grain had been piled up in front of the port hole in that case, it is clear the officers must have been ignorant of the fact that it was imperfectly fastened.

In *Carmichael* v. *The Association*, L. R. 19 Q. B. Div., (1887), p. 242, there was evidently no knowledge that the shutter had been insufficiently screwed down, yet it was held that the damage arose "from improper navigation of the ship."

In *Dobell* v. *S. S. Co.*, 1895, 2 Q. B. 408, 414, it was also clear that the condition of the port hole against which cargo had been piled up, was unknown to those in charge of the ship; yet it is the situation of the port with reference to the cargo, and its inaccessibility which were held to be the determining factors.

All these cases are cited by Mr. Justice GRAY in the *Silvia* case, apparently with approval, and the decision of that case is based mainly not upon the fact that those in charge of the vessel knew the iron cover was not closed, but on the physical accessibility of the port hole, thus: 171 U. S., p. 465.

> "Had the cargo been so stowed as to require much time and labor to shift or remove it, in order to get at the ports, the fact that the iron covers were left open at the beginning of the voyage might have rendered the ship unseaworthy."

(b) Again, whose knowledge or ignorance is to determine the question of seaworthiness—merely that of the Master (as Judge DALLAS seems to suppose), or that of all having to do with the port holes, or that of every one on board? If, as we understand it, ignorance creates

unseaworthiness because there is no one on board to correct the fault, or report the danger, and the open port or insecure fastening, although *physically accessible*, may be thus said to be *mentally obstructed*, so, also, the knowledge of *anyone* on board who might remove this mental obstacle in case of need, should render the vessel seaworthy. The inconvenience of probing the state of mind of all on board, in order to determine the question of seaworthiness, is sufficiently apparent, and the difficulty of obtaining truthful evidence on the subject not hard to foresee.

(c) Assuming, however, that every soul on board of the *Indiana* was ignorant of the insecure fastening, did such ignorance render the vessel unseaworthy, while under the same physical conditions, plus knowledge, she would be deemed seaworthy? It is submitted that a rule which seeks to ascertain the physical condition of the ship (seaworthiness or unseaworthiness) by evidence of the mental state of the officers and crew (knowledge or ignorance) is fraught with subtlety and difficulty. The duty of inspecting and closing the ports rests upon the same persons (second and third officers and carpenter) who are charged with the duty of inspecting and closing them while at sea. Memory is frail and defective, and the conscious knowledge of one moment may be lost the next—

"Out of mind as soon as out of sight."

At what point of time must the knowledge be possessed, and how long retained to relieve the owner of the burden of unseaworthiness? If the knowledge is lost, that is (to take the present case), the open or insecurely fastened port is *forgotten*, will that burden be instantly retransferred to the owner? To illustrate, the carpenter may know that the covers have been left open, or not securely fastened, half an hour before sailing; he may forget that fact half an hour after sailing, and continue for-

getful until the damage is done; is the vessel seaworthy because of his knowledge *at the moment of sailing?* Or, having knowledge prior to sailing he may have forgotten the fact at the moment of sailing, and afterwards remembered it again or not as the case may be; could it be said in either event that lack of conscious knowledge when the vessel sailed destroyed her seaworthiness? However these nice questions be decided, one thing is clear that the physical results are the same, whether the officers and crew have sailed in ignorance of the fault, or having known it, have forgotten it after the voyage has begun; the fault is not corrected, and the damage is done. In the case of the *Silvia*, when the threatening weather arose, of what avail was the knowledge of those on board as to the insecurely covered port hole? The result was the same as if there had been no knowledge, or (as may possibly have been the fact) it had been forgotten.

The difficulty of applying the test of knowledge or ignorance to cases of this kind, forms not the least of the objections to its adoption.

5. Other distinctions urged by Appellee.

(a) *The glass cover of the Silvia.*

It is said the glass cover was properly and tightly fastened, and was itself a sufficient protection against the influx of water.

But it turned out that it was no sufficient protection and that it was broken and submerged in weather that was not extraordinary. If the protection of this glass cover of itself rendered the *Silvia* seaworthy, surely the decision in the case would have been based upon this simple ground, both in the Lower Courts and in this Court. On the contrary it was assumed in all the Courts for the purposes of the decision that the omission to close

the glass cover, was negligence, and that the closing of the glass cover did not of itself render the vessel seaworthy. Said WALLACE, J., in the Court of Appeals, 68 Fed., 230:

> "Assuming however that they were not (that is, justified in supposing that there could not be any cause for apprehension from the port hole protected as it was by the glass cover) and that they were negligent in not putting on the iron cover, we think the case is controlled by the Act of Congress and that its provisions relieve the steamship from liability."

What proved to be the insufficient protection of the glass cover in the case of the *Silvia* gave way to the action of the sea a few hours after leaving not in an extraordinary storm, but in what is called by this Court (171 U. S., p. 464), "rough weather," while the insufficient fastening in the case of the *Indiana* availed to protect the cargo for four days in weather described as "heavy swell, choppy head sea," etc. (Record p. 60.) As above remarked, the negligence in one case may be greater than in the other, but the act *is essentially the same*, viz., a failure to properly use the appliances provided for the protection of the port hole against the influx of water.

(b) *The height of the port hole above the water line.*

It is said by appellee that the port hole on the *Indiana* was only two or three feet above the water line while that of the *Silvia* was eight or nine feet above. As a matter of fact, although the second officer, *Forbes*, speaking roughly, without measurement, stated that he should think the port must have been from two to four feet above the water (Record p. 53), the careful measurement by Mr. Ebsen, taking the draft of the *Indiana* upon leaving and upon arrival (as given by the log-book in evidence), and making the necessary corrections, found that on the day in question the bottom edge of the port light

was *four feet and half an inch* above the water level. (Record p. 57.)

This is not very important, nor has the precise distance of the port hole above the water line been considered a salient factor in the discussion of these cases. In the *Silvia* no allusion is made to the distance of the port hole above the water, in giving the reasons why she should be considered seaworthy. In the case of *Steele* v. *S. S. Co.*, *supra*, the port was only a foot above the water line, but this was not one of the questions referred by the Court to the jury, and in *Carmichael* v. *The Association*, L. R. 19 Q. B., 242, it was actually below the water line, yet the Court held the damage therefore to arise from improper navigation of the ship. In *Dobell* v. *S. S. Co.* L. R., 1895, 2 Q. B., 408, where free access to the port (which was frequently submerged) was prevented by cargo, Lord ESHER considers the fact of inaccessibility as of sole importance, not the height of the port hole. He says:

> "There was a port hole through which water could come. If that had been all and there had been the means of immediately closing the port hole the matter would have been otherwise. But here there were no facilities for closing the port hole, for it could only be closed after the removal of a considerable part of the cargo; so that if there were rough weather or a storm, the water would be coming in all the time until the port hole could be got at and closed."

A valid distinction might fairly be drawn between a port hole situated at a height rendering it liable to be submerged in *ordinary* weather, and one so situated as never to be submerged except in *extraordinary* weather. But where both ports, as in the cases of the *Silvia* and *Indiana* were covered by water in such weather as a vessel must encounter in every voyage, the difference of two

or three feet in their respective positions above the water line forms an insufficient basis for distinguishing the cases.

(c) *That the Silvia's ports were in a place where the shutters would usually be left open, while the Indiana's were not.*

This distinction is not based upon fact. In both cases either cargo or passengers were carried in the steerage or between-decks compartment in which the port holes were situated. If passengers were carried only the glass covers were fastened; if cargo, both glass and iron covers were fastened. In the case of the *Silvia*, during the voyage in question, ship's extra stores were carried in the compartment, but as the hatches were battened down, it was evidently not the intention of those on board to visit the compartment unless unexpected necessity should arise. In the *Indiana the port hole was in a compartment frequently and from time to time used for steerage passengers, and not in what the appellee calls a "cargo hold."*

Captain Shackford says (Record p. 63):

"Q. Is that lower steerage used for cargo or passengers, or both?

"A. It is used for either.

"Q. What is the means of access from the upper deck to the upper steerage?

"A. By stairways and the hatch.

"Q. And from the upper steerage to the lower steerage?

"A. By stairway for the passengers and by taking off the hatch and putting an iron ladder alongside the hatch stanchions when there are no passengers."

And, on cross-examination:

"XQ. Captain, do I understand that the hold is sometimes used for passengers?

"A Yes, sir."

* * * * * *

On p. 64.

"Q. Berths had at times been placed in that hold?

"A. *Yes, we carry passengers there frequently.*"

Dickson, the third officer, tells us that steerage passengers are carried in that compartment, and that it is never known until the last minute whether cargo or passengers are to be placed there. In stating why he made inspection particularly of these ports, he says (Record p. 89):

> "Not of the one, not of that one particular one, but of all the holds, all the steerages. For this reason on leaving Liverpool, the steerages sometimes we use them, the holds, for steerage passengers, and we are very particular about the steerage, because we can't say to the last minute whether they are going to use them for steerage passengers or not."
>
> * * * * * *
>
> (p. 90.)
>
> "Q. You say you don't know until the last moment before leaving Liverpool?
>
> "A. Not the last moment—twenty-four or forty-eight hours—sometimes as late as six hours, that there is no cargo, and sometimes we use it for steerage passengers."

Forbes, the second officer, it is true, states (Record p. 54) that the compartment in question "Has always been filled with cargo during the time I have been on the ship." But, it does not appear how long he had been on the ship prior to this occurrence. There is, therefore, no contradiction whatever of Captain Shackford, who, as Marine Superintendent of the Line, and best qualified to know, says that the compartment in question had been used *frequently* for passengers, prior to the accident. We have, therefore, precisely as in the case

of the *Silvia*, a between-decks compartment, frequently used for passengers, and no more a cargo hold in the technical sense, than was the *Silvia's* similarly situated compartment.

(**d**) *That in the Indiana the compartment was a cargo hold, while in the Silvia it was not.*

As just shown, the compartment of the *Indiana* was no more exclusively used for cargo than that of the *Silvia*. Either might be used for cargo, or for passengers, and were in the same position in the ship. If the record of the *Silvia* is referred to it will be seen that her captain testified that the *Silvia's* compartment was used for cargo as well as for passengers precisely as was that of the *Indiana*. (*Silvia* Record, *Clark*, 12, 27.)

If it be meant that the use of the compartment for ship's stores in the cases of the *Silvia* and for cargo in the case of the *Indiana* upon the particular voyage, apart from the general use of the compartments, creates a distinction, why?

In both cases cargo was damaged.

The cargo in the *Indiana's* compartment presented no greater obstacle to reaching the port hole than did the ship's stores in the *Silvia's*. In neither case, apparently, was there the slightest danger, either of the stores or cargo, breaking or injuring the port hole from the inside.

(**e**) *The knowledge of those on the Silvia that the iron port was not closed.*

This distinction, the only one made by the Courts below, has already been discussed.

II.

Unseaworthiness and fault or error in management under the Harter Act.

( ) This Court in the *Carib Prince*, 170 U. S., 658 (1897), has decided that the ship owner is not relieved by

the exemptive terms of the Harter Act from the duty of furnishing a seaworthy vessel, where the unseaworthiness was due to a latent defect of structure, viz., the quality of the iron in a certain rivet. Mr. Justice WHITE said:

> "The exemption of the owners or charterers from loss resulting from 'faults or errors in navigation or in the management of the vessel' and for certain other designated causes in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character when due diligence has been used cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved as respects every claim of every other description, from the duty of furnishing a seaworthy ship."

We understand then that the warranty of unseaworthiness remains unimpaired since the Harter Act, in all that relates to the structure and equipment of the vessel. We do not understand that this Court has yet decided where loss has resulted directly from *fault or error in management*, that the ship owner is not relieved by the exemption of the third section, even though prior to the act the fault or error in management would have rendered the vessel technically unseaworthy; in other words, that *management* under the statute is to be restricted to the voyage after leaving port.

(**b**) Of course, the owner must have exercised due diligence, and in this regard there is no dispute in the present case. The *Indiana* was manned by competent officers. Captain Townsend, who died before he could be examined in the case, had been with the com-

pany for fourteen years and was an excellent commander. The chief officer had had thirty years' experience at sea and had been master of several ships; it was the same with the other officers, including the carpenter, who had been ten or fifteen years with the company, and had always performed his duty in a satisfactory manner. (Record, Shackford, p. 61, 62); the ports, deadlights and covers were all of proper type and construction, and were in good and perfect condition and repair.

As was said by Judge McPherson, in the District Court (Record, p. 97):

> "We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped and supplied, and that she was in all respects fit for the voyage except in the one respect of which the libellant complains," etc.

(c) That the leaving open or insecurely fastening the port covers was primarily a fault of management, is clear. The equipment was perfect; in its use, only there was fault or error. The same persons had supervision of the ports and deadlights, both before and after leaving (viz., the second and third officers and the carpenters), and their acts before and after, with respect to the ports or deadlights were essentially the same.

Long before the Harter Act the Courts established the distinction between the failure to supply proper structure and equipment and the misuse or nonuse of that equipment, which they called a fault of navigation or management, whether occurring before or after sailing. So, also, they distinguished between the strict warranty by which an owner is bound by every act of his agents concerned with furnishing structure and equipment, and the due diligence only required of him in the selection of those agents who are to man and navigate the vessel.

Thus as to the furnishing of proper structure and equipment and misuse or failure to use the same:

In *Headley* v. *Pinckney & Sons, S. S. Co.*, App. Cases 1894, 222, a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on, a seaman engaged in performing his duty, fell overboard, in consequence of the neglect to ship the stanchions and rails and was drowned. The House of Lords held that this was a neglect of duty, but did not render the ship unseaworthy. After defining the word "seaworthy" and approving *Steele* v. *S. S. Co.*, 3 App. Cases, 72, LORD HERSCHELL said:

> "After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped, *the fault was in not making use of the equipment with which she had been furnished.* * * * If any of the necessary appliances were lost or destroyed in the course of the voyage, it would no doubt be the duty of the master to use all reasonable means to supply others in their places just as it might be his duty during the voyage to restore the hull or machinery if damaged to a condition suited to the perils to be encountered; but if the appellant's argument were to prevail it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.
>
> "The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy."

Judge GRAY in his dissenting opinion in the Court of Appeals cites with approval the case of *Headley* v. *Pinckney & Sons S. S. Co.*, and further says:

> "There is no suggestion that her equipment in the matter of ports or deadlights was defective. If

properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy, if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management.

"So, if a ship is properly equipped with anchors and the requisite tackle for stowing them, it does not render her unseaworthy if on leaving port, the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them." (Record, p. 108.)

In the *Carron Park*, L. R., 15 Prob. Div., 203, a valve had been negligently left open by which while the vessel was still lying moored at her loading berth, water entered and damaged the cargo. It was *Held* that this did not render the vessel unseaworthy, HANNEN, P., saying:

"It did not render the vessel unseaworthy for the reception of this cargo which had already been loaded on board the vessel when in good condition. It is, for the purposes now under consideration, as though during the passage from New Fairwater, the valve had been negligently opened—that is, it was, as Lord Blackburn said, in *Steele* v. *State Line Steamship Company*, 3 App. Cas., 72, of leaving a port hole open at sea, negligence on the part of the crew, and not unseaworthiness of the ship."

In the *Mexican Prince*, 82 Fed., 484, JUDGE BROWN, of the District of New York (1897), laid down a similar rule. There damage to cargo arose from the failure to fit proper sounding pipes and from an obstruction to a certain valve. It was *Held* that the failure to use the equipment properly, was a fault in management. Said the Court (p. 488):

"The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners and a neglect to observe their written

orders in that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship, and to put her in seaworthy condition. In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; it arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy at the commencement of the voyage. The third section of the Harter Act, therefore, exempts them from liability, so far as respects this negligence. The case of The Silvia, 64 Fed., 607; Id., 15 C. C. A., 362, 68 Fed., 230, is quite analogous in this regard."

In Carmichael v. *the Liverpool Association*, L. R., 19 Q. B. D., 242, during the loading of cargo an opening or port in the side of the vessel was insufficiently secured, so that during the voyage water leaked in. The Court held that this was damage arising from "improper navigation of the ship within the articles of association."

This case followed that of *Good* v. *the London Steamship Owners' Association*, L. R., 6 C. P., 563, where it was held that negligence in closing a cock which let in water to the injury of the cargo was "improper navigation of the ship."

In the *Silvia* these cases and others are cited with approval and as in accord with the ruling then made by this Court.

In several of these cases, therefore, the fault of management or navigation occurred before sailing: in some of them it occurred after sailing. Indeed, in most cases the omission to use properly the equipment furnished, has a double aspect; there is the omission to secure or properly fasten *before* sailing, as well as the failure to correct the fault *after* sailing. Thus in the *Silvia*, there was the fault of leaving open the iron shutter before, and the omission to close it after sailing.

In none of the cases can it be said that the commission of the fault was confined to the period while the vessel was at sea.

It clearly appears, therefore, that it is the *nature of the act*, not the time of its performance with respect to the sailing of the vessel, that determines whether it is a fault in management or not.

So *as to agents.* A vessel must be properly manned, as well as properly constructed and equipped, in order to be seaworthy; yet the owner's measure of responsibility in the selection of the agents to man the vessel is quite different from his absolute warranty of the acts of his agents in construction, equipment and stowage, the *shore agents*, as distinguished from the *sea agents.* In the case of the shore agents, a warranty of faultlessness is the measure of the owner's liability; in the case of the sea agents, merely due diligence in their selection. The employment of a sufficient number of experienced navigators, officers and men, selected with due care, renders the vessel seaworthy in this respect, although there may be fatal latent defects of intellect, memory and perception existing in those selected. See *Earnmoor* v. *Ins. Co.*, 44 Fed., 374, where an owner was exonerated from liability on account of a drunken pilot, having used due diligence in his selection.

Machlachlan on Shipping, 418.

Carver on Carriage by Sea, § 18.

These defects, however, unlike the hidden flaw of iron or steel in the rivet, do not render the owner liable. To these sea agents is confided the management of the ship's appliances, the pipes, valves, ports and hatches, and other equipment, whether she be in port, loading or discharging cargo, or at sea; and it would seem an arbitrary rule that fixes the moment of sailing as a fatal limit of time with respect to which prior acts of management render

the vessel unseaworthy, while the same acts performed an instant after the moment of sailing by the same agents have no such effect. Such must be the result unless the owner in fulfilment of his warranty of seaworthiness is bound himself to go down into the compartments and with his own hands close and screw up the ports, and batten the hatches, or send a shore representative to do it.

Antecedently of any statute, therefore, one recognizes that in respect of seaworthiness, the ship owner, while held to the strictest warranty in respect of structure and equipment, might with fairness be relieved, after exercising due diligence in selection, of responsibility for those acts of management, which are performed by agents whose faultlessness is not warranted by him, whether occurring before or after sailing.

(d) Then comes the Harter Act, providing in section 3 that if the owner shall exercise due diligence, he shall not "be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel."

In the *Silvia* (supra) Justice GRAY just touched without passing upon the question. He says (171 U. S., 466):

> "The case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel * * * but they do include at the least the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The exemption is not by the terms of the Act limited to the period of the voyage.

Moreover, if the word "management" is to be restricted to matters occurring during the actual voyage, it is difficult to see in what respect it enlarges the scope of the Act beyond that already given by the word

"navigation." The statute carefully distinguishes between the two words, and relieves the owners from faults or errors in navigation *or in the management* of the vessel, yet all acts of management occurring at sea are covered by the word "navigation."

Carmichael v. *Liverpool Association*, supra, 19 Q. B. D., 242.

Good v. *London Association*, L. R., 6 C. P., 563.

Canada v. *British Association*, 23 Q. B. D., 342.

Carver Carriage by the Sea, S. 26, Note Z.

That it was not the intent of the Statute to restrict faults of management to those occurring while the vessel was actually at sea (which would then have been also faults of navigation) has been decided by more than one Court.

In the *Glenochil*, 1896, Prob. p. 10, 15, President JEUNE in construing these words of the Statute said:

> "I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case GORELL BARNES, J., said (p. 19):

> "It seems to me that all exceptions extend from the time that all the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not cover there is nothing here to limit the time during which the word 'management' extends, and it seems to me it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

In the *Rotherfield*, 8 R. I. D., § M, pp. 102, 104, the Marseilles Tribunal of Commerce in construing an exception in an English bill of lading exonerating the ship owner from responsibility for the fault of pilots, officers and crew, in the "management or navigation of the ship," defined the word "management" as follows:

"It includes certain accessory operations, which without being properly called navigation, enter into the precautions to be taken for the benefit (interest) of the ship, either in *loading or discharging* the merchandise."

(e) It is said that by the proviso of section 3, the owner must use due diligence "to make the ship in all respects seaworthy" before he can avail himself of the exemption, and that such due diligence is not only to be exercised by himself, but by all his agents or servants, whether officers, crew or other persons. This is true where the act concerns the structure and equipment of the vessel, and not its use, or abuse. But to say that it applies to acts of management prior to sailing is merely another way of asserting that the word "management" under the statute is restricted to the period while the vessel is at sea, which is the very point in controversy.

As already pointed out, there is the clear distinction between the two classes of the owner's agents in regard to seaworthiness; the shore agents dealing with structure, equipment and stowage, are warranted faultless, the sea agents are merely selected with due diligence. The "due diligence" of the statute, therefore, in the case of shore agents means absolute responsibility for their acts; in the case of the sea agents who alone can commit "faults in the management" "due diligence" means proper care in their selection (which is not denied in this case), and thereafter there shall be exemption from responsibility for their acts of management. It is doubtful whether *Dobell* v. *Rossmore*, supra, can be reconciled to the later case of the *Glenochil*, *supra*, but in any event, the blocking up of the port hole in the former case introduced the element of bad stowage as distinguished from management, which distinguishes it from the present case.

III.

The decree of the Court below should be reversed, and the decree of the District Court dismissing the libel with costs be reinstated.

J. RODMAN PAUL,

Of Counsel for Appellant.

APPENDIX.

"THE HARTER ACT."

Act of February 13, 1893, 27 U. S. Statutes at Large, p. 445.

Chap. 105. An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owners, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended

voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.